

ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
JOHN B. ROBBINS, JUDGE

DIVISION II

CACR 05-1382

SEPTEMBER 13, 2006

WILLIE JAMES CARTWRIGHT
APPELLANT

APPEAL FROM THE GRANT
COUNTY CIRCUIT COURT
[NO. CR2004-119-2]

V.

HONORABLE PHILLIP H. SHIRRON,
JUDGE

STATE OF ARKANSAS

APPELLEE

AFFIRMED

Appellant Willie James Cartwright appeals his conviction for felony theft of property. He argues two points on appeal: (1) there is insufficient evidence to support the conviction, and (2) the trial court erred (a) when it permitted the State to amend, on the day of trial, the Information to allege that appellant was an habitual criminal, and (b) when it admitted into evidence the State's documents showing the prior convictions. We affirm.

Appellant was charged with commercial burglary and felony theft of property, having been accused of stealing money from Scooter's Department Store in Sheridan, Arkansas. Betty Reed, the clerk working on July 21, 2004, stated that she worked in the store that day and was responsible for depositing the store's receivables into the bank. The store's office was located in the back part of the store, where upon a desk a bank bag held each day's

checks, cash, and change in a separate envelope for each day of the week. When she closed for the day at approximately 5:30 p.m., she discovered that the bank bag was empty; the envelopes for that week were gone. She called the police, to whom she reported that she saw only one suspicious person in the store that day between 4:30 p.m. and 5:25 p.m. This person was a tall, slender black male wearing blue shorts and a baggy gold-colored shirt. The man looked around for a few minutes, told Betty that he did not see anything he needed, left the store, and then returned a few minutes later to look around some more. Betty inquired if she could assist him, the man told her he was looking for a candle for his wife, but he left again without purchasing anything, telling Betty he would return later.

Betty explained that when she closed for the day and went to put the day's receipts into the bank bag, she found it odd that the door to the office was locked. Betty had to go around to the back of the building to enter the office from the other door. Betty realized that seven daily envelopes were gone from the bag, leading her to call the police.

In a search of the immediate area, Officer Wilkerson found all seven envelopes in a nearby gravel parking lot, less than 100 yards away from the store. All the checks were recovered with the exception of one. Approximately \$660 cash was missing and never recovered. Multiple fingerprints were lifted from the envelopes, many of them revealed in police records to belong to Willie James Cartwright, described as a black male, 6'1" tall, 162 pounds, born May 16, 1967. There were other latent fingerprints on the envelopes that did not match appellant's prints.

The police located appellant and sought to ask him about the day in question. Appellant was given his Miranda rights prior to giving a statement. According to the investigating officer, appellant first said he had never been to Sheridan; appellant's residence was in Pine Bluff. Upon questioning and the revelation to him that his fingerprints were on the envelopes, appellant said that he was in Sheridan that day at an Exxon Station at the corner of Highways 270 and 167. Appellant said he went to the gas station bathroom, where he saw a bank bag behind the trash can. He stated that he removed the envelopes from the bag, looked inside each envelope, and saw money, but he put everything back where it was and set the bag back behind the trash can where he had found it. Appellant stated that he had never been to Scooter's and did not know where it was.

Betty was not able to identify appellant in a photographic lineup, but she was able to positively identify appellant at trial as the person she saw in the store that day. She could not say appellant entered the store's office because she did not see him go in there, but he was in the store that day, and he was the only person in the store that day with whom she was unfamiliar. The store owner, Rita Lane, testified that she was in Scooter's that day, and that there were seven envelopes in the bank bag that afternoon around 2:30 p.m.

At the conclusion of the State's presentation, appellant moved for directed verdict, challenging the sufficiency of the State's proof that appellant was the person who took the money from the bank bag. The trial court overruled the motion and the renewal of that

motion. The jury considered the evidence before it and found appellant guilty of theft but not guilty of commercial burglary. This appeal followed.

On appeal, appellant argues that the trial court erred in failing to grant his motion for directed verdict. In reviewing a challenge to the sufficiency of the evidence, we view the evidence in a light most favorable to the State and consider only the evidence that supports the verdict. *Cluck v. State*, __ Ark. __, __ S.W.3d __ (Feb. 6, 2006). We affirm a conviction if substantial evidence exists to support it. *Id.* Substantial evidence is that which is of sufficient force and character that it will, with reasonable certainty, compel a conclusion one way or the other, without resorting to speculation or conjecture. *Id.* Any questions of credibility are left to the jury, the finder of fact. *Hutcheson v. State*, 92 Ark. App. 307, __ S.W.3d __ (2005). False or improbable explanations of incriminating circumstances may be considered as evidence of guilt. *Martin v. State*, 346 Ark. 198, 57 S.W.3d 136 (2001).

Appellant was found guilty of theft pursuant to Ark. Code Ann. § 5-36-103(a)(1) (Repl. 2006), which requires proof that the person “knowingly takes the property of another person with the purpose of depriving the owner thereof[.]” A person acts knowingly with respect to his or her conduct when he or she is aware that his or her conduct is of that nature. Ark. Code Ann. § 5-2-202(2). Appellant asserts that the State did not prove he was the culprit. He argues in his brief that the State’s case was weakened by: (1) the store clerk’s inability to identify him from a photographic lineup; (2) the existence of other unidentified prints on the envelopes; (3) the absence of any proof that appellant’s fingerprints were on the

bank bag, the office door, or the office desk; and (4) the limited value of appellant's statement to the police claiming at most "temporary possession" of the money in the bank bag. Appellant does not persuade.

The jury had before it sufficient evidence from which it could conclude that appellant was guilty. At trial, the store clerk positively identified appellant as the man in the store that day. The strength of her testimony was a matter to be decided by the jury. Appellant, by his own admission, was in Sheridan on the day in question and in fact handled the envelopes and money therein, despite his improbable story of finding the bag in the bathroom of a nearby gas station and returning the items to the location he found them. We hold that there is sufficient circumstantial evidence upon which the jury could conclude that appellant was the person who took the money from Scooter's. Therefore, we affirm this point.

Appellant's other argument on appeal is that the State was improperly allowed on the morning of trial to amend its Information to charge appellant as a habitual criminal, having two or more prior felonies. The prosecutor told the judge that he had obtained information three days earlier about some convictions from Mississippi, which he had relayed to defense counsel. Defense counsel argued that the amendment was untimely and that counsel did not have time to investigate the prior convictions, though he acknowledged that he was told of the convictions as the prosecutor had said. The trial judge permitted the amendment at that juncture, because this discussion was being held outside the jury. However, the judge stated

that if appellant was found guilty, he would hear evidence during the sentencing phase and determine at that time whether the documents were valid.

As it turned out, the jury found appellant guilty of theft. Therefore, during the sentencing phase, the State offered appellant's "pen pack" into evidence after questioning an employee of the prosecutor's office who had retrieved the information. Appellant's counsel objected on the basis that the copies of the three Mississippi convictions were of poor quality, and further that the names, birth dates, and social security numbers on the prior convictions did not uniformly match appellant's. The trial judge concluded that the proof of the prior convictions contained sufficient indicia of trustworthiness to be accepted, in light of the photograph appended with the documents, and with the discrepancies among the documents being minor. Appellant contends that the trial court erred by permitting amendment and allowing the evidence of the prior convictions. We disagree.

The State is entitled to amend an Information at any time prior to the case being submitted to the jury so long as the amendment does not change the nature or degree of the offense charged or create unfair surprise. *Stewart v. State*, 338 Ark. 608, 999 S.W.2d 684 (1999); *Kilgore v. State*, 313 Ark. 852 S.W.2d 810 (1993). An amendment that adds an allegation that the defendant is a habitual offender does not change either the nature or the degree of the crime; it simply authorizes a more severe punishment. *Skiver v. State*, 336 Ark. 86, 983 S.W.2d 931 (1999); *Finch v. State*, 262 Ark. 313, 556 S.W.2d 434 (1977). Moreover, appellant cannot claim surprise because three days before trial, defense counsel

was made aware of the prior convictions that the State intended to introduce. *See Skiver, supra.* We affirm the trial court's allowing the State to amend the Information to allege that appellant was an habitual criminal with two or more prior felonies.

With regard to the contention that the trial court committed error by allowing the inconsistent documents to be admitted into evidence, we likewise disagree with his argument. The State presented the testimony of Deena Payne, an employee of the prosecutor's office, who testified that she was certified to retrieve criminal records. She had searched first with appellant's name and date of birth. This search returned a federal criminal identity number, and it showed that appellant sometimes altered his social security by changing the last digit. The federal search revealed the following aliases: Willie Kimble, Willie J. Kimble, Willie James Kimble, Willie J. Cartwright, Willie Cartwright, Willie James Cartwright, and Wille James Cartwright. The federal search listed several offenses committed in Mississippi. When she contacted the authorities in Mississippi, there was too little time to have receipt of certified copies with raised seals of authenticity. Instead, she accepted verified copies via facsimile, and they were for three felony convictions attributed to Willie James Kimble; two of these felonies had matching birth dates, and the third felony was off by one day. Mississippi authorities also faxed a photograph of a black adult male matching these convictions. Deena verified that she was on the telephone with Mississippi personnel at the time she observed her fax machine printing out the pages transmitted, verifying receipt.

The trial judge concluded, in an in camera hearing, that these three prior convictions were proved by overwhelming evidence to be appellant's, having "too many indicia of trustworthiness." The judge, therefore, allowed the State at that point to proceed with the habitual allegation. We hold that no reversible error occurred with regard to that decision.

A previous conviction, or finding of guilt, of a felony may be proved by any evidence that satisfies the trial court beyond a reasonable doubt that the defendant was convicted or found guilty. *Pacee v. State*, 306 Ark. 563, 816 S.W.2d 856 (1991); *see also* Ark. Code Ann. § 5-4-504(a) (Repl. 2006). On appeal, the test is whether there is substantial evidence that an appellant was previously convicted of the prior felony in question. *Mulkey v. State*, 330 Ark. 113, 952 S.W.2d 149 (1997). While there may have been slight discrepancies among the documents, those discrepancies were sufficiently tied to appellant through his criminal history. We believe that the trial court had before it substantial evidence that appellant was convicted of at least two prior felonies.

Appellant also asserts, for the first time in his appellate brief, that these purported prior felonies cannot be used for enhancement purposes because the documents do not reflect that he was represented by counsel or waived counsel. Our supreme court has held that a prior conviction cannot be used to enhance punishment unless the defendant was represented by counsel or validly waived counsel. *Stewart v. State*, 300 Ark. 147, 777 S.W.2d 844 (1989). In the event the record of the prior conviction does not show the defendant was represented by counsel, a presumption arises that the defendant was denied assistance of

counsel and the conviction cannot be used to enhance punishment under our habitual offender provisions. *Id.* However, our supreme court requires a defendant to make a specific objection to the trial court in order to raise this issue on appeal. *See Byrum v. State*, 318 Ark. 87, 884 S.W.2d 248 (1994); *Jones v. State*, 83 Ark. App. 195, 119 S.W.3d 70 (2003); *Wing v. State*, 14 Ark. App. 190, 686 S.W.2d 452 (1985). In the absence thereof, we do not address the issue on appeal.

We affirm appellant's conviction for theft of property.

GRIFFEN and CRABTREE, JJ., agree.